

1  
2  
3  
4  
5  
6  
7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 JAMES NOLEN NANCE, JR.,

11 Plaintiff,

12 v.

13 BREMERTON POLICE DEPARTMENT, *et*  
*al.*,

14 Defendants.

Case No. C08-5039 BHS/KLS

REPORT AND  
RECOMMENDATION

**Noted for:**  
**August 22, 2008**

15 Before the Court is the motion for summary judgment of Defendants Bremerton Police  
16 Department and City of Bremerton ("City Defendants"). (Dkt. # 28). In support of their motion,  
17 Defendants provide the Declarations of Mark E. Koontz (Dkt. # 29) and Larry Mersereau (Dkt. # 30).  
18 Plaintiff has not responded to Defendants' motion. Under Local Rule 7 (b)(2) failure to file papers in  
19 opposition to a motion may be deemed by the Court as an admission that Defendants' motion has  
20 merit.

21 After careful review of Defendants' motion, supporting evidence, the balance of the record,  
22 and viewing the facts in the light most favorable to the Plaintiff, the undersigned recommends that the  
23 City Defendants are entitled to dismissal of the claims against them because Plaintiff has failed to state  
24 a violation of his constitutional rights.

25 **I. BACKGROUND**

26 In his verified complaint, Mr. Nance alleges that when he was arrested in January, 2006 on  
27

1 kidnaping charges, his car was confiscated, towed and then released to and sold by the Bremerton  
2 Police at an auction. (Dkt. # 5, p. 3). After Mr. Nance went to trial twenty-two months later on other  
3 charges and the trial judge released his property back to him, his vehicle had already been sold. *Id.*  
4 Mr. Nance alleges that he did not receive paperwork relating to the seizure of his vehicle and did not  
5 receive notice that his vehicle was to be sold. *Id.*

## 6 II. FACTS

7 Defendants provide the following facts, which are not disputed by Plaintiff:

8 On January 14, 2006 at approximately 1:13 a.m., the Bremerton Police Department (“BPD”)  
9 received notice that a woman had just been raped at the Chieftain Motel in Bremerton, Washington.  
10 (Dkt. # 29, Exh. B at 2). BPD patrol officer Donnell Rogers was dispatched to investigate. *Id.* The  
11 victim told Officer Rogers that her ex-boyfriend, plaintiff James Nance, was driving his 1992 gold  
12 Ford Crown Victoria, Washington license plate 334-TVQ, when Mr. Nance approached the victim  
13 and asked her to get in the vehicle. *Id.* at 2-3. The victim ignored Mr. Nance because there was a  
14 protective order between them. *Id.* at 2. Mr. Nance pulled over his vehicle, walked to the victim,  
15 took her by the hair, and told her if she did not get in the vehicle, he would kill her. *Id.* The victim  
16 told Officer Rogers that she was in fear of her life, so the victim got in the vehicle. *Id.* According to  
17 the victim, Mr. Nance took her to a room he had rented in the Chieftain Motel and proceeded to  
18 strike her in the face, strangle her, and sexually assault her. *Id.* at 2-3. After a struggle, the victim  
19 escaped to the motel lobby where she called 911. *Id.* at 3. Mr. Nance fled in his vehicle. *Id.*

22 At 9:15 a.m. on January 14, 2006, BPD patrol officer Jeffrey Inklebarger was on routine  
23 patrol in Bremerton when he saw plaintiff’s gold Crown Victoria in a parking lot at the Perry  
24 Avenue Mall in Bremerton. (Dkt. # 29, Exh. C). BPD contacted Chico Towing, which towed the  
25 vehicle and placed it in a secure garage as evidence of a suspected crime. *Id.* BPD obtained a search  
26 warrant for the vehicle, and on January 20, 2006 BPD executed the search warrant. *Id.*, Exh. C.

1 After the search warrant was executed, the vehicle was impounded to Chico Towing. *Id.*; Dkt. # 30,  
2 Exh. A.

3 On January 21, 2006, Chico Towing sent a Notice of Impound of an Unauthorized Vehicle  
4 to James N. Nance, Jr., P.O. Box 4573, Bremerton, WA 98310. (Dkt. # 30, Exh. B). This is the  
5 name and address listed by the Department of Licensing as the owner of the 1992 Ford Crown  
6 Victoria, Washington license plate number 334TVQ. *Id.* Chico Towing did not receive any response  
7 to this notice. *Id.*

9 On January 27, 2006, Chico Towing sent a Notice of Custody and Sale of Abandoned  
10 Vehicle to James N. Nance, Jr., P.O. Box 4573, Bremerton, WA 98310 informing Mr. Nance that  
11 after 15 days from the date of the notice, the 1992 Ford Crown Victoria would be sold at auction to  
12 the highest bidder. *Id.*, Exh.C. The Notice of Custody and Sale of Abandoned Vehicle also notified  
13 Mr. Nance that the total amount he owed for towing and storage as of January 27, 2006 was  
14 \$448.52. *Id.* Chico Towing did not receive any response to this notice. *Id.*

16 On March 4, 2006, Chico Towing sold the 1992 Ford Crown Victoria, Washington license  
17 plate 334-TVQ, at an auction to the highest bidder for the amount of \$650. *Id.*, Exh. D. Chico  
18 Towing incurred expenses for towing and storage of the vehicle in the amount of \$971.00, leaving  
19 Mr. Nance with a balance of \$321.00 owed to Chico Towing. *Id.* At no time has Mr. Nance or  
20 anyone on his behalf contacted Chico Towing regarding the 1992 Ford Crown Victoria Washington  
21 license plate 334-TVQ. *Id.*

23 After a jury trial, Mr. Nance was convicted of second degree assault, felony harassment,  
24 felony violation of a court order, unlawful imprisonment, and attempting to elude pursuing police.  
25 (Dkt. # 29, pp. 1-2). He was sentenced to 84 months in prison for the second degree assault  
26 conviction and 60 months for each of the other crimes. *Id.* at 3.

### III. STANDARD OF REVIEW

Summary judgment shall be rendered if the pleadings, exhibits, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Federal Rule of Civil Procedure (“Fed. R. Civ. P.”) 56(c). In deciding whether summary judgment should be granted, the court must view the record in the light most favorable to the nonmoving party and indulge all inferences favorable to that party. Fed. R. Civ. P. 56(c) and (e). When a summary judgment motion is supported as provided in Fed. R. Civ. P. 56, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in Fed. R. Civ. P. 56, must set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e). If the nonmoving party does not so respond, summary judgment, if appropriate, shall be rendered against that party. *Id.*

The moving party must demonstrate the absence of a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). Mere disagreement or the bald assertion that a genuine issue of material fact exists does not preclude summary judgment. *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9<sup>th</sup> Cir. 1987). A “material” fact is one which is “relevant to an element of a claim or defense and whose existence might affect the outcome of the suit,” and the materiality of which is “determined by the substantive law governing the claim.” *T.W. Electrical Serv., Inc. v. Pacific Electrical Contractors Ass’n*, 809 F.2d 626, 630 (9<sup>th</sup> Cir. 1987).

### IV. DISCUSSION

To state a claim under 42 U.S.C. § 1983, the defendant must be a person acting under color of state law; and his conduct must have deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535

1 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). Implicit in  
2 the second element is a third element of causation. *See Mt. Healthy City School Dist. v. Doyle*, 429  
3 U.S. 274, 286-87 (1977); *Flores v. Pierce*, 617 F.2d 1386, 1390-91 (9th Cir. 1980), *cert. denied*,  
4 449 U.S. 875 (1980). When a plaintiff fails to allege or establish one of the three elements, his  
5 complaint must be dismissed.  
6

7 To establish that a city or city department is liable under 41 U.S.C. § 1983, Plaintiff must  
8 demonstrate that the alleged constitutional deprivation was the product of a policy, practice or  
9 custom adopted and promulgated by City Defendants. *Monell v. Department of Social Services*,  
10 436 U.S. 658 (1978). Plaintiff must establish that he was deprived of a constitutional right and that  
11 the City Defendants had a policy, practice, or custom which amounted to “deliberate indifference”  
12 to the constitutional right and was the “moving force” behind the constitutional violation. *Levine v.*  
13 *City of Alameda*, 525 F.3d 903, 907 (9<sup>th</sup> Cir. 2008), citing *Van Ort v. Estate of Stanewich*, 92 F.3d  
14 831, 835 (9<sup>th</sup> Cir. 1996).  
15

16 Plaintiff alleges that the City Defendants sold his property at auction without providing him  
17 adequate notice prior to the sale. (Dkt. # 5, p. 3). Essentially, Plaintiff is alleging deprivation of  
18 property without due process of law. However, if there are available post-deprivation state  
19 remedies, that is all the process that is due. *See Hudson v. Palmer*, 468 U.S. 517, 533 (1983);  
20 *Parratt v. Taylor*, 451 U.S. 527, 541-44 (1982), *overruled in part on other grounds, Daniels v.*  
21 *Williams*, 474, U.S. 327 (1986). “[T]he availability of a tort suit, for defendants’ random,  
22 unanticipated acts,” satisfies the due process clause. *Blaylock v. Schwinden*, 856 F.2d 107, 110 (9<sup>th</sup>  
23 Cir. 1988), *superseded by* 862 F.2d 1352 (1988).  
24

25 Washington law provides a remedy for the return of property for persons aggrieved by an  
26 unlawful search and seizure. *See*, CrR 2.3(e):  
27

1 Motion for Return of Property. A person aggrieved by an unlawful search and  
2 seizure may move the court for the return of the property on the ground that the  
3 property was illegally seized and that the person is lawfully entitled to possession  
4 thereof. If the motion is granted the property shall be returned. If a motion for  
5 return of property is made or comes on for hearing after an indictment or information  
6 is filed in the court in which the motion is pending, it shall be treated as a motion to  
7 suppress.

8 Plaintiff does not allege there was no post-deprivation process available to him. Nor does  
9 he allege a policy, practice or custom of the City Defendants that allegedly violated his  
10 constitutional rights. Rather, Plaintiff states that Defendants failed to provide him with notice prior  
11 to towing and the sale of his vehicle. (Dkt. # 5, p. 3).

12 The summary judgment evidence before the Court, however, reflects that attempts were  
13 made to notify Plaintiff of the impound and sale of his vehicle by sending notices to the address  
14 provided by Plaintiff to the Department of Licensing. Plaintiff was sent notices of impound and  
15 custody and sale of abandoned vehicle to the name and address listed by the Department of  
16 Licensing by the owner of the 1992 Ford Crown Victoria vehicle, Washington license plate number  
17 334TVQ. (Dkt. # 30, p. 2). Those notices were returned as “Box closed, unable to forward, return  
18 to sender.” *Id.* The evidence also reflects that Plaintiff never contacted Chico Towing regarding  
19 his vehicle. *Id.*

20 Plaintiff has failed to establish that he was deprived of a constitutional right or that the City  
21 Defendants had a policy, practice or custom that amounted to “deliberate indifference” to the  
22 constitutional right and was the “moving force” behind the constitutional violation. Accordingly,  
23 the undersigned recommends that summary judgment in favor of the City Defendants on all of  
24 Plaintiffs’ claims be granted.

#### 25 26 IV. CONCLUSION

1 For the reasons stated above the Court should **GRANT** the State Defendants' motion for  
2 summary judgment (Dkt. # 28). A proposed order accompanies this Report and Recommendation.

3 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure,  
4 the parties shall have ten (10) days from service of this Report and Recommendation to file written  
5 objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those  
6 objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time  
7 limit imposed by Rule 72(b), the Clerk of the Court is directed to set the matter for consideration on  
8 **August 22, 2008**, as noted in the caption.

9  
10  
11 DATED this 6th day of August, 2008.

12  
13  
14  
15  
16 

17 Karen L. Strombom  
18 United States Magistrate Judge  
19  
20  
21  
22  
23  
24  
25  
26  
27